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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 550

JAMES F. FOGARTY, *et al.*,
Petitioners,

—against—

CARL J. AUSTRIAN, *et al.*,
Respondents.

No. 551

HARRY J. PASTERNAK, etc.,
Petitioner,

—against—

CARL J. AUSTRIAN, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I

The Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

The Court of Appeals by its reversal has held that the inherent historic equity powers of United States District Courts sitting in a plenary action as a court of equity is abolished by implication by the Bankruptcy Act. This Court has in unmistakable terms set forth the existence of the power of a United States District Court to award additional costs in the nature of counsel fees as an incident of litigation (*Sprague* v. *Ticonic Bank*, 307 U. S. 161 (1939)). The Court of Appeals held that the combination of Sections 221(4), 241 and 242 of the Bankruptcy Act grants to the reorganization court exclusive jurisdiction to determine the question of additional allowance notwithstanding that the petitioner herein, a defendant in the plenary action in the Southern District of New York, is not a party in interest to the reorganization proceeding. Accordingly, this Court should settle the question as to whether a United States District Court in a plenary action authorized by a reorganization court other than the one in which the action is tried maintains its historic equity power to award additional allowance where dominating reasons of justice require such allowance.

II

The Court of Appeals has far departed from the accepted and usual course of judicial proceedings.

The Court of Appeals in reversing the judgment of the Court below relied upon *Brown* v. *Gerdes*, 321 U. S. 178 (1944) and *Leiman* v. *Guttman*, 336 U. S. 1 (1949), two

cases which, although considered by the respondents and the District Court, had been abandoned by the respondents in their appeal to the Court of Appeals. These cases, although not relied on in any way by the respondents in the Court of Appeals, were relied upon by the Court of Appeals as a basis for its ruling that the District Court did not have jurisdiction to entertain the application of this petitioner when cited in a brief of an amicus, the Securities and Exchange Commission, in the Court of Appeals.

Brown v. *Gerdes* posed the question whether the fees of attorneys employed to represent a bankrupt estate in litigation in a state court could be fixed by the state court or should be fixed by the Federal bankruptcy court where the debtor corporation was in reorganization under Chapter X. The New York Court of Appeals and this Court held that under Section 221(4), as well as Section 241 of Chapter X of the Bankruptcy Act, the reorganization court has exclusive jurisdiction.

The *Brown* case involved a class of claimant specifically mentioned in Section 241 of the Bankruptcy Act. This Court so stated (at p. 182). The inapplicability of that case to Jonas is evident. He was sued by the respondents as trustee; he is not in any of the classes mentioned in the Bankruptcy Act; he had no fiduciary relationship or otherwise to the debtor.

Leiman v. *Guttman, supra,* involved claims for services of the attorneys of a stockholders' protective committee in connection with the reorganization of a debtor under Chapter X of the Bankruptcy Act. The *Leiman* case contains express statements as to the basis of this Court's decision. It was intended to carry out the intent of Congress to put a stop to abuses by reorganization committees in making excessive uncontrolled charges for themselves and their counsel (pp. 6-7). The Bankruptcy Act itself gave the

Court broad power of supervision over reorganization committees (p. 8) and this Court exercised this specific power to pass upon fees of counsel for a reorganization committee. This Court in the *Leiman* case (at p. 9):

> "Moreover it is the bankruptcy court that is in the best position to know what work was done by the fee claimant, how important and involved it was * * * how much of it was necessary, how much of it was effective." (at p. 9)

In the case at bar the knowledge is and was solely in the trial Court.

III

The Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court.

This Court in *Williams* v. *Austrian*, 331 U. S. 642 (1947), held that the United States District Court for the Southern District of New York had jurisdiction to entertain the plenary action out of which the present application of the petitioner for his allowance arose under the broad provisions of Section 2a(7) of the Bankruptcy Act notwithstanding the absence of allegations showing diversity of citizenship of the parties as the basis for Federal jurisdiction. Accordingly, we respectfully submit to this Court that as the District Court had jurisdiction to hear the main controversy, it had jurisdiction to hear an incident of such controversy, particularly when the District Court and it alone was familiar with the basis upon which relief could be granted in such incident.

IV

This Court should grant a writ of certiorari to the United States Court of Appeals for the Second Circuit to resolve the Federal question presented in this petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

JAMES F. FOGARTY, *et al.*, *Petitioners,* —*against*— CARL J. AUSTRIAN, *et al.*, *Respondents.*	No. 550
HARRY J. PASTERNAK, *etc.*, *Petitioner,* —*against*— CARL J. AUSTRIAN, *et al.*, *Respondents.*	No. 5551

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Respondents, Chapter X Trustees, oppose the petitions at bar as devoid of substantial grounds for the issuance of a writ of certiorari under this Court's Rule 19.

The decision of the Court of Appeals is right. It marks neither a departure from precedent nor a conflict among the courts of appeals of the several circuits. It follows the clear mandate of the pertinent provisions of the Bankruptcy Act and was foreshadowed in recent pronouncements of this Court.

The decision below turned upon a jurisdictional principle that is neither novel nor open to challenge; namely, that in the absence of contrary reason, in a Chapter X proceeding, the court wherein the petition is filed has exclusive and complete jurisdiction over applications involving payments by the debtor.

Concluding, accordingly, that the Southern District lacked jurisdiction over petitioners' applications, the court below dismissed the applications without ruling on the underlying question of petitioners' right to reimbursement. That question relates to whether in a non-diversity suit a Federal court has power to follow state law and award extraordinary costs not permitted or authorized by Federal law.* The petitioners have not seen fit to argue that question at length. For that reason, the Trustees treat the matter only briefly herein, while urging most vigorously that provisions of state law may not sweep aside Federal rules of law in areas, such as this, related to the functioning of a Federal court, affected with a Federal interest, and blanketed by Federal statutes.

Question Presented

Since the court below did not reach the question whether applicable law permits allowances to be made in a case of this kind, and since petitioners raise the point only in passing, it would seem that the jurisdictional question will be dispositive of the petitions. It results that the propriety of granting a writ depends upon whether the Southern

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*Petitioner Pasternak's claim raises a different question: *i.e.*, there being no statutory authorization in Federal law, is there "inherent power" in a Federal court to award litigation expenses to successful defendants in a case such as this?

District court had jurisdiction to entertain the petitioners' applications. We frame the issue thus presented as follows:

> When Chapter X Trustees, acting pursuant to an order of the Reorganization Court and in connection with a Plan of Reorganization approved by that Court, have brought plenary suit against former directors, stockholders and other defendants to recover assets of the Debtor corporation in a different United States District Court, has the latter Court jurisdiction to entertain defendants' applications for reimbursement of their litigation expenses from the Debtor's assets?

Statement of the Case

These points, culled from the opinion of Harlan, J., writing for the unanimous court below, deserve emphasis:

1. The reorganization of Central States Electric Corporation was initiated by the filing of a petition under Chapter X of the Bankruptcy Act in the United States District Court for the Eastern District of Virginia on February 23, 1942. (216 F. 2d, p. 280.)

2. The allowances for which petitioners have applied constitute claims "against the assets of the Debtor remaining in the hands of the Virginia Reorganization Court". (216 F. 2d, p. 281)

3. Exclusive jurisdiction over such claims is committed to the Reorganization Court, for they arise out of a law suit "which was a potential asset of the estate" and "involved in the plan"; they were " 'in connection with the plan and incident to the reorganization' "; and, "being

fixable after confirmation of the plan", they were subject to the approval of the Reorganization Judge. (216 F. 2d, p. 284.)

4. Over such claims, the Bankruptcy Act vests in the Reorganization Court complete power to "determine and measure" as well as to enforce the allowances payable from the Debtor's estate. (216 F. 2d, p. 283.)

5. *Brown* v. *Gerdes,* 321 U. S. 178 (1944) recognizes, and *Leiman* v. *Guttman,* 336 U. S. 1 (1949) affirms, the "pervasive" character of the Bankruptcy Act's reservation of exclusive jurisdiction to the Reorganization Court. (216 F. 2d, p. 282.)

6. The state statute (Article 6-A of the New York General Corporation Law) does not, and could not, broaden the jurisdiction of a Federal court beyond that prescribed by Federal law. (216 F. 2d, p. 285.)

Argument

I

NO REASONS EXIST WARRANTING A REVIEW ON THE QUESTION OF JURISDICTION.

There is not here a court of appeals determination that is in conflict with the applicable precedents of this Court, or with the decisions of any other court of appeals. There is not here a question of broad public interest or of novel importance, such as would require review by this Court.

There is present only a narrow and unique point, and one which only an improbable conjunction of circumstances

would raise anew. There would have to be not only a plenary action brought by Chapter X Trustees against former directors and officers of a Debtor in reorganization. Federal jurisdiction would have to be founded, not on diversity of citizenship, but upon an independent ground; and the Federal forum would have to be situated in one of the few states having statutory provisions akin to Article 6-A of the New York General Corporation Law. Only then, assuming a similar result after trial, could the present question arise.

In the 10 years that Chapter X and Article 6-A have coexisted as law, the question at bar has not heretofore arisen. Little danger exists that a similar state of facts will be reproduced in the future. Thus, there is not present here an issue of broad impact.

Nor is this branch of the law in need of a clarifying decision by this Court. The determination offered for review is clear and comprehensive. The petitioners' briefs cast no doubt upon either its legal soundness or its common sense.

1. Under the Bankruptcy Act, the Southern District Court Did not Have Jurisdiction over Petitioners' Applications for Reimbursement from the Debtor's Estate.

In common with all other Federal courts, the District Court for the Southern District of New York has only such jurisdiction as Federal law commits to it; and nowhere does Federal law invest the Southern District with jurisdiction over petitioners' applications. No decision of this Court suggests that such jurisdiction exists. On the contrary, express provisions of the Bankruptcy Act and recent decisions of this Court are at one in demonstrating that exclusive jurisdiction over this matter is committed to the Virginia Reorganization Court.

Petitioners do not contradict the Trustees' assertion that if jurisdiction over their applications is committed to the Reorganization Court, there is no concurrent power in the Southern District court. Consistency would perhaps dictate that they argue that the Southern District court has sole jurisdiction. But logic compels them to avoid that contention, for if a court other than the Reorganization Court could fix and enforce claims payable from the Debtor's assets, the resulting determination, if final and binding, would invade the Reorganization Court's control. If merely advisory and subject to revision or rejection by the home court, the determination would serve no purpose.

That which logic suggests, the Bankruptcy Act confirms. As the court below wrote, "administration of the estate of a bankrupt or debtor belongs exclusively to that Court which has acquired jurisdiction over its affairs" (216 F. 2d, p. 281). That is particularly true in Chapter X proceedings. Section 111 of the Act (11 U. S. C. A. § 511, 52 Stat. 884), which is found in Chapter X and is entitled "Exclusive jurisdiction over debtor and property", reads:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

In this case there is no question that the District Court for the Eastern District of Virginia is, in the words of Section 111, the "court in which . . . [the] petition" of this Debtor "is filed". Accordingly, petitioners are under the necessity of showing that it would be inconsistent with the provisions of Chapter X to recognize that the Virginia court has exclusive jurisdiction. They do not even attempt

to do so, apparently acknowledging that it is in no wise inconsistent with Chapter X to localize administration of a debtor's estate in the court wherein the petition is filed, thereby promoting integrated and unified administration of the estate.

Not alone the general principle enunciated by Section 111, but two specific provisions of the Act point to the sole and exclusive jurisdiction of the Reorganization Court over the petitioners' applications.

Section 221(4) (11 U. S. C. A. § 621(4), 52 Stat. 897) makes plain that the payments in question must be subjected to the sole scrutiny of the Reorganization Court. In this connection, we can do no better than to quote from Judge Harlan's opinion on reargument (216 F. 2d, p. 284):

> ". . . That section provides that the reorganization judge shall confirm a plan 'if satisfied that—* * * (4) all payments made or promised by the debtor * * * for services and for costs and expenses * * * in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge'. These allowances were payable 'by the debtor'. Arising out of a lawsuit which was a potential asset of the estate and involved in the plan, they were 'in connection with the plan and incident to the reorganization'. And being fixable after confirmation of the plan, they were 'subject to the approval of the [reorganization] judge'."

To petitioners' earnest argument that the scope of Section 221(4) should be restricted to cases wherein fees are sought by direct participants in the reorganization, Judge Harlan replied (216 F. 2d, p. 284):

> "We find nothing in § 221(4) which limits its application to expenses incurred or services performed by parties to the reorganization or their attorneys."

This Court had already made clear, in *Leiman* v. *Guttman, supra,* 336 U. S. 1 (1949), that its earlier holding in *Brown* v. *Gerdes, supra,* 321 U. S. 178 (1944), was to be given full play, and that the "paramount and exclusive jurisdiction" of the reorganization court (p. 184) was to apply to "all cases" (p. 182). As was pointed out in *Leiman* (336 U. S., at p. 8):

> ". . . And § 221(4) is written in pervasive terms—it applies to 'all payments' for services 'in connection with' the proceeding or 'in connection with' the plan and 'incident to' the reorganization, whoever pays them. . . ."

Reinforcing Section 221(4), Section 242 adds further "detailed machinery" to assure integrated administration of a reorganization debtor's estate by providing (11 U. S. C. A. § 642, 52 Stat. 900):

> "The [reorganization] judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—
>
> * * * *
>
> "(2) by any other parties in interest except the Securities and Exchange Commission. . . ."

Petitioners' applications herein were patently for "costs and expenses incurred in connection with the administration of an estate" in bankruptcy and are presented by "parties in interest". Their claims totaling in excess of $45,000, are substantial and fall quite literally within the words of Section 242. The clear language of that statute does not permit any limiting of its effect merely to employees of the Reorganization Court or participants in the reorganization proceeding. "Parties in interest" are not solely those who were before the Reorganization Court, but also those whose expenses were "incurred in connection with the administration of an estate" and in connection with a "plan" approved by the Reorganization Court.

From the standpoint of the Debtor herein, there can be no dispute that the claims which petitioners here make are precisely described by the quoted words. The suit against petitioners was authorized by the Reorganization Court and provision was made in the plan of reorganization for the setting aside of a sum to cover fees and expenses of the reorganization, including those involved in the enforcement and collection of contingent assets of the Debtor. Petitioners' expenses were incurred in connection with the administration of the Debtor's estate and in connection with the Plan and should be processed solely through the Reorganization Court.

2. Petitioners' Position is not Supported by *Williams* v. *Austrian*, 331 U. S. 642 (1947), or by Section 2a(7) of the Act.

Petitioners Fogarty, *et al.*, under Point II of their petition, intimate that in *Williams* v. *Austrian, supra,* this Court recognized that the jurisdiction of the Southern District court included power "to hear and determine each and

every part, as well as every incident of this plenary action, including the incident of petitioners' applications for assessment of their expenses" (p. 26).

The argument misapprehends the *Williams* case in this Court, which decided merely that the Trustees' plenary suit on state-created causes of action could be brought in the Southern District court, notwithstanding lack of diversity of citizenship. It was held that the Southern District court was free to entertain the suit without deference to the geographical or venue limitations contained in Section 23(b) of the Bankruptcy Act. The section was construed as inapplicable because the Trustees' suit was an incident to a Chapter X reorganization and not to an ordinary bankruptcy.

The *Williams* case did not hold, and did not even intimate, that the Southern District court had concurrent jurisdiction or equal power with the Reorganization Court. To the contrary, this Court there observed, "certain aspects of a bankruptcy proceeding could be handled only by the court in which the [bankruptcy] adjudication was had" (331 U. S., at p. 647). Among those aspects, manifestly, is a proceeding such as the present to charge the assets of the estate in a substantial sum.

Nor does Section 2a of the Bankruptcy Act invest the Southern District court with jurisdiction over such a matter. If its "twenty-one specifically designated powers" were each a source of authority for the Southern District court, as petitioners Fogerty, *et al.*, contend (Petition, p. 18), that Court would have had power to "enforce" as well as merely to "allow" the amount of assessments it made. (See, for example, Section 2a(13) and (15).) But petitioners do not claim enforcement powers for the

Southern District court and, indeed, in the court below denied that such powers exist. In so doing, they implicitly impugn their own premise—that Section 2 confers all the powers of the Reorganization Court upon the Southern District court.

A brief examination of Section 2 discloses that it cannot conceivably be read as indiscriminately applicable to all Federal courts in every case. Among its 21 subdivisions are the power to allow claims, authorize the bankrupt's business to be conducted, cause assets to be distributed, close estates, confirm or reject arrangements or plans, and make orders and enter judgments.

At least in proceedings under Chapter X, those aspects of bankruptcy administration are solely committed to the court where the petition is filed. Otherwise, splintered and piecemeal results would follow. The present case well illustrates the value of the integrating principle underlying the *Brown* and *Leiman* decisions.

3. State Law Cannot Broaden the Jurisdiction of the Southern District Court.

Without directly saying so, petitioners Fogerty, *et al.*, contend in effect that Article 6-A of the General Corporation Law of New York bestows jurisdiction upon the Southern District court that it would not otherwise have had. To that contention, the short answer is: jurisdiction which Federal law denies to a Federal court may not be supplied by state law. The Bankruptcy Act has designedly withheld the jurisdiction in question from the Southern District court; under the supremacy clause, the New York Legislature may not undo Congress' work.

4. Petitioners' Remaining Arguments on Jurisdiction Are Without Merit.

All petitioners join in urging that the Southern District court is in a better position to know the value of the services of petitioners' attorneys before that court; and is, therefore, in a better position to assess the petitioners' expenses. The same arguments had equal force in the *Brown* and *Leiman* cases and were rejected in both cases. The worth of the services of petitioners' attorneys is not a question wholly foreign to the Reorganization Court's ken. If the expenses are properly reimbursible, that Court will be able to fix their amount.

Finally, the reservation by the Southern District court, in its judgment dismissing the Trustees' action, of jurisdiction for the purpose of permitting the parties to apply to the Court for further orders and directions "in connection with costs, expenses and allowances" is of no significance here. Petitioners' argument that such retention of jurisdiction enhanced the power of the Southern District court to deal with their applications is a bootstraps argument and proves nothing. The District Judge could not add to his own jurisdiction and could not "retain" jurisdiction in a field in which he was not properly clothed with jurisdiction.

II.

FEDERAL LAW GOVERNS PETITIONERS' CLAIMS TO REIMBURSEMENT AND RECOGNIZES NO SUCH RIGHT.

This being a non-diversity case, the Southern District court was under no compulsion to look to state law for rules of decision. The District Court concluded otherwise on a misconstruction of an earlier opinion of the Court of

Appeals. *Austrian* v. *Williams,* 198 F. 2d 697, *cert. den.* 344 U. S. 909. Judge Harlan, in his opinion below, called attention to the error (216 F. 2d, p. 281).

Federal law opposes the granting of applications such as petitioners' in the absence of "special circumstances" not here present. A strong Federal policy stands against saddling penalties upon reorganization trustees and thereby discouraging their vigorous pursuit of potential assets of their debtor.

In an area such as this, permeated with Federal interest, and involving, as petitioners concede, an "incident" of a suit by a Federal court officer in a Federal court, there was no warrant for relying upon Article 6-A of the New York General Corporation Law as justification for the allowances to petitioners Fogarty, *et al.* With respect to petitioner Pasternak, his circumstances were not such as to justify, even if there were jurisdiction so to do, resort to the Federal court's inherent power to allow extraordinary expenses.

Petitioners' reliance upon *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541 (1949) as calling for a different result, needs no comment beyond reference to the well-considered reply to that point made by Judge Harlan in his opinion below (216 F. 2d, pp. 282, 284-285).

Conclusion

Nothing is presented in the petitions to warrant review by this Court. The applicable statutes point strongly and unmistakably to the result reached by the Court of Appeals,

and this Court has, in at least two recent decisions, also pointed the way to that decision.

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 550

JAMES F. FOGARTY, HERBERT C. FREEMAN, CHRISTIAN A. JOHNSON, DAVID G. MCCORNACK, JOHN H. ECCLES AND HUGH B. BAKER, PETITIONERS

v.

CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION

No. 551

HARRY J. PASTERNAK, AS EXECUTOR OF THE ESTATE OF RALPH JONAS, DECEASED, PETITIONER

v.

CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURAE

The Solicitor General submits this memorandum on behalf of the Securities and Exchange Commission, *amicus curiae,* with respect to the petitions for writs of certiorari filed herein. The Commission

appeared as *amicus curiae* in the court below and the decision of which review is sought accords with its views.[1]

QUESTION PRESENTED

Whether a United States District Court, in which a trustee of a debtor in proceedings under Chapter X of the Bankruptcy Act pending in another court has unsuccessfully brought suit, has jurisdiction to award reasonable expenses and attorneys fees to successful defendants in that action pursuant to either a state indemnification statute or the court's general equity powers, or whether the jurisdiction of the reorganization court over any such fees and expenses is exclusive.

STATEMENT

The trustees of Central States Electric Corporation, which has been in reorganization in the Eastern District of Virginia under Chapter X of the Bankruptcy Act, brought an action in the United States District Court for the Southern District of New York against the debtor's controlling stockholder and others, including the petitioners herein.[2] The action, based essentially upon acts of mismanagement, was dismissed as to the petitioners herein in the district court, although as to two of them, petitioners Fogarty and Freeman in No. 550,

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[1] The Commission has also appeared as *amicus curiae* in various earlier aspects of this case and was a party, pursuant to Section 208 of Chapter X of the Bankruptcy Act, to the reorganization proceeding of Central States Electric Corporation in the United States District Court for the Eastern District of Virginia, to which this case is ancillary.

[2] *Williams* v. *Austrian*, 331 U.S. 642.

it was found that while officials of the debtor they had acted contrary to its interests and the dismissal was solely by reason of the running of the statute of limitations.[3]

This action had resulted from extensive investigation and after substantial litigation in the reorganization court.[4] The plan subsequently approved in that court contained provisions anticipating any proceeds from the litigation in New York and also set aside a specific fund to cover fees and expenses of the reorganization, contingent liabilities, and the enforcement and collection of contingent assets of the debtor.[5] During the pendency of the litigation in New York, the plan was confirmed and consummated.[6]

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[3] *Austrian* v. *Williams*, 103 F. Supp. 64, 117. As against two other defendants, who are not petitioners herein, the district court awarded a judgment in excess of $14,000,000, but this was reversed on appeal on the ground that the statute of limitations had run against them also. *Austrian* v. *Williams*, 198 F. 2d 697 (C.A. 2), certiorari denied, 344 U.S. 909. Although the petition in No. 550 (pp. 16, 27) indicates that the action was based on rights "created by the laws of New York," there has been no determination to that effect. As pointed out by the Court of Appeals in the last cited case, "the causes of action may have arisen under Virginia law." 198 F. 2d at 699. And see the dissent of Judge Clark at 198 F. 2d 703.

[4] See *Committee for Holders, etc.* v. *Kent*, 143 F. 2d 684 (C.A. 4).

[5] *Central States Electric Corp.* v. *Austrian*, 183 F. 2d 879 (C.A. 4), certiorari denied, 340 U.S. 917; *In the Matter of Central States Elec. Corp.*, SEC Corp. Reorg. Release No. 82 (1950) 15, 39, 40.

[6] *Chase* v. *Austrian*, 189 F. 2d 555 (C.A. 4), certiorari denied, 341 U.S. 952; *In re Central States Elec. Corp.*, 112 F. Supp. 281 (E.D. Va.), leave to appeal denied, 206 F. 2d 70 (C.A. 4).

After the unsuccessful determination of the trustee's action in New York, the petitioners herein filed applications in the District Court for the Southern District of New York for the determination and assessment against the debtor of reasonable expenses and attorneys fees incurred in their defense of the action. The applications of petitioners in No. 550 were based on Article 6A of the New York General Corporation Law, which authorizes indemnification from a corporation to present or former corporate officials for the reasonable expenses and legal fees incurred in the successful defense of an action against them arising from their position with the corporation. The application on behalf of the petitioner's testator in No. 551, who had not been an official of the debtor, was based on the general equity powers of the court. The district court decreed that petitioners herein, as defendants in the district court action, should "recover from the plaintiffs", the debtor's trustees, the following amounts which it "assessed and allowed" (Consolidated App. in the Court below, 90a):

Fogarty and Freeman	$30,000.00
plus disbursements of	1,185.53
McCornack	3,000.00
Johnson	3,000.00
Eccles	3,000.00
Baker	2,000.00
Pasternak, as Executor of the Estate of defendant Jonas	3,500.00
Total	$45,685.53

The Commission, as *amicus curiae,* urged in the court below that neither a state indemnification statute nor general principles of equity could properly be applied to authorize these fees from the estate of a debtor in a Chapter X proceeding and that in any event the district court was without jurisdiction to award them in view of the exclusive jurisdiction over fees of the court in which the reorganization proceeding was pending. The court below did not reach the first question but decided the second in accord with the views of the Commission.

ARGUMENT

1. The decision of the court below was correct and does not conflict with decisions of this Court.

Section 221(4) of the Bankruptcy Act provides that, as a prerequisite to confirmation of a plan, the judge must be satisfied that

> all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; * * *

In *Brown* v. *Gerdes,* 321 U. S. 178, 183, this Court discussed that section and concluded:

> The finding as to allowances required by § 221(4) is as explicit and as mandatory as the

> finding of "fair and equitable, and feasible" required by §221(2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency.

Similarly, in *Leiman* v. *Guttman,* 336 U. S. 1, 8, the Court relied upon the "pervasive terms" of that section in holding that the fees encompassed within the jurisdiction of the reorganization court were not limited to those paid for services to the debtor.

Williams v. *Austrian,* 331 U. S. 642, relied on by petitioners, No. 550 (pp. 24-26), held that another district court may serve as an ancillary reorganization court for the purpose of entertaining causes of action on behalf of an estate, but there is no indication therein that findings as to allowances may be delegated by the court in which the reorganization is pending. Indeed, that case clearly recognized that the ancillary jurisdiction of other district courts applies only "so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending."[7] To permit the ancillary court to exercise jurisdiction over fees would clearly trench upon the jurisdiction of the reorganization court because of "the effect", adverted to in *Brown* v. *Gerdes,* 321 U. S. at 181,

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[7] Although this language was quoted in the *Williams* case (331 U.S. at 648) from *Lathrop* v. *Drake,* 91 U.S. 516, and related to the ancillary jurisdiction of district courts under Section 1 of the Bankruptcy Act of 1867, the *Williams* opinion equated that section to Section 2 of the present Bankruptcy Act (*id.,* at 646).

"which a depletion of the cash resources of the estate may have on both the fairness and feasibility of the plan of reorganization." As there pointed out (*id.* at 182), Chapter X "provided a centralized control over all administration expenses, of which lawyers' fees are a part." Hence, it was held (*id.* at 186) that although a state court could make a binding determination on the merits and had control over the litigation, it could not determine fees "as an incident thereto".

Nor does the decision below conflict with *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, relied on at pp. 29-30 of the Petition in No. 550. As pointed out by the court below, 216 F. 2d at 282, that case has no relation to the jurisdictional question involved, since assuming *arguendo* that that case should require the New York indemnity provisions to be applied under the facts of this case, the reorganization court could still make the determination as to the appropriate fees.

2. The importance of the case depends in large part upon the ultimate determination of the question which the court below did not reach, *i. e.*, whether either the New York indemnity statute or general equity principles authorize the payment of fees and other expenses by the debtor to the petitioners. If, as the Commission contends, the answer is negative, it is of no importance which court makes this determination. If, however, we should

be wrong as to this question, we believe it is of importance that the determination as to the amounts of the fees be made by the court which is administering the debtor's assets.

Respectfully submitted,

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